IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LEWIS G. DUNKEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether in this prosecution for willful violation of the criminal tax laws, the district court erred in instructing the jury that willfulness may be negated by an asserted good faith misunderstanding of the law only if that misunderstanding was objectively reasonable.

2. Whether the district court erred in instructing the jury that knowledge of the law may be inferred from strong suspicion of and indifference to the truth.

3. Whether the counts of the indictment charging tax evasion were duplicitous.

4. Whether the evidence was sufficient to sustain petitioner's convictions on the tax evasion counts.

5. Whether petitioner's Fourth Amendment rights were violated by a government informant's retrieval of certain documents from a trash dumpster located in his office parking lot.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Bollenbach v. *United States*, 326 U.S. 607 (1946)	15
California v. *Greenwood*, 486 U.S. 35 (1988)	4, 18
Cheek v. *United States*, cert. granted, 110 S. Ct. 1108 (1990)	5, 20
Cohen v. *United States*, 297 F.2d 760 (9th Cir. 1962)	9
Crain v. *United States*, 162 U.S. 625 (1896)	10
Katz v. *United States*, 389 U.S. 347 (1967)	4, 19
Lawn v. *United States*, 355 U.S. 339 (1958)	9, 10
Oliver v. *United States*, 466 U.S. 170 (1984)	18
Sansone v. *United States*, 380 U.S. 343 (1964)	10, 11
Spies v. *United States*, 317 U.S. 492 (1943)	14, 16
Turner v. *United States*, 396 U.S. 398 (1970)	8
United States v. *Bishop*, 412 U.S. 346 (1973)	6
United States v. *Bryan*, 868 F.2d 1032 (9th Cir.), cert. denied, 110 S. Ct. 167 (1989)	11
United States v. *Cheek*, 882 F.2d 1263 (7th Cir. 1989), cert. granted, 110 S. Ct. 1108 (1990)	5
United States v. *Cincotta*, 689 F.2d 238 (1st Cir.), cert. denied, 459 U.S. 991 (1982)	8
United States v. *Dack*, 747 F.2d 1172 (7th Cir. 1984)	13
United States v. *Diaz*, 864 F.2d 544 (7th Cir. 1988), cert. denied, 490 U.S. 1070 (1989)	7
United States v. *Doe*, 465 U.S. 605 (1984)	18
United States v. *Duncan*, 850 F.2d 1104 (6th Cir. 1988), cert. denied, 110 S. Ct. 732 (1990)	12

Cases—Continued: Page

United States v. *England*, 347 F.2d 425 (7th Cir. 1965) 13
United States v. *Glick*, 710 F.2d 639 (10th Cir. 1983), cert. denied, 465 U.S. 1005 (1984) 7
United States v. *Hawkes*, 753 F.2d 355 (4th Cir. 1985) 11
United States v. *Jewell*, 532 F.2d 697 (9th Cir.) cert. denied, 426 U.S. 951 (1976) 8
United States v. *Johnson*, 319 U.S. 503 (1947) 11
United States v. *Knight*, 705 F.2d 432 (11th Cir. 1983) 7
United States v. *MacKenzie*, 777 F.2d 811 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986) 7
United States v. *Masat*, 896 F.2d 88 (5th Cir. 1990) 13, 14
United States v. *Massa*, 740 F.2d 629 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985) 7
United States v. *Michaels*, 726 F.2d 1307 (8th Cir.), cert. denied, 469 U.S. 820 (1984) 19
United States v. *Murdock*, 290 U.S. 389 (1933) 6
United States v. *Pomponio*, 429 U.S. 10 (1976) 6
United States v. *Restrepo-Granda*, 575 F.2d 524 (5th Cir.), cert. denied, 439 U.S. 935 (1978) 8
United States v. *Robinson*, 651 F.2d 1188 (6th Cir.), cert. denied, 454 U.S. 875 (1981) 12
United States v. *Shorter*, 809 F.2d 54 (D.C. Cir.), cert. denied, 484 U.S. 817 (1987) 11, 12
United States v. *Terry*, 702 F.2d 299 (2d Cir.), cert. denied, 461 U.S. 931 (1983) 19
United States v. *Vahalik*, 606 F.2d 99 (5th Cir. 1979), cert. denied, 444 U.S. 1081 (1980) 19
United States v. *Waldeck*, No. 89-2152 (1st Cir. July 12, 1990) 13, 14
United States v. *White*, 879 F.2d 1509 (7th Cir. 1989), cert. denied, 110 S. Ct. 1471 (1990) 11
Wisniewski v. *United States*, 353 U.S. 901 (1957) 13

Constitution and statute and rule: Page

U.S. Const. Amend. IV 3, 4, 17, 18, 19
Internal Revenue Code (26 U.S.C.):
§ 7201 ..... *passim*
§ 7203 2
Fed. R. Crim. P. 8(a) 9

Miscellaneous:

1 C. Wright, *Federal Practice & Procedure* (2d ed. 1982) 9, 11-12

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-142

JAMES C. DUNKEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 900 F.2d 105.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1990, and a petition for rehearing was denied on May 11, 1990. Pet. App. 16a-17a. The petition for a writ of certiorari was filed on July 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of willfully attempting to evade taxes for the years 1981 and 1983, in violation of 26 U.S.C. 7201 (Counts 1 and 4), and three counts of willfully failing to file income tax returns for the years 1981, 1982 and 1983, in violation of 26 U.S.C. 7203 (Counts 2, 3 and 5). Gov't C.A. Br. 2. Petitioner was sentenced to a three-year term of probation. Pet. App. 2a. The court also ordered petitioner to pay fines in the amount of $15,000 and to perform 500 hours of community service. Gov't C.A. Br. 3.

1. Petitioner is a self-employed dentist. Prior to 1981, he filed federal income tax returns and made timely estimated tax payments. In 1981, however, he decided that the income tax is "voluntary." He stopped filing tax returns and began keeping two sets of books, one of which excluded cash receipts and third-party checks that were endorsed over to his staff to pay their salaries. Pet. App. 1a-2a, 10a-11a; Gov't C.A. Br. 5.

Petitioner owned the office building in which he conducted his dental practice. He also rented office space to two other dentists and five business tenants. From 1981 to 1983, petitioner collected rental payments, ranging between $29,000 and $37,000 annually, and he collected rent in the form of silver coins from Louis Snider in the early 1980s. Petitioner also received payment, sometimes in the form of cash, for antique cars that he restored and sold. Pet. App. 4a; Gov't C.A. Br. 6, 7.

Delinquent returns, filed by petitioner six months after he was informed that he was the subject of a

criminal investigation, reflect that he owed $15,640 in delinquent taxes. According to his testimony at trial, he had paid only $5,100 of that amount. Gov't C.A. Br. 10.

2. Prior to trial, petitioner moved to suppress certain documents that an informant had retrieved from a metal trash dumpster in petitioner's office parking lot. Petitioner argued that the documents were obtained in violation of the Fourth Amendment. At the suppression hearing, it was established that the dumpster was located more than 55 feet from the nearest part of petitioner's office building; that the dumpster was used by two other dentists and five business tenants; that patients, employees and visitors of other building tenants used the parking lot; that the lot was open to the public; and that the dumpster was unlocked and accessible to passers-by. Pet. App. 4a. After the two-day evidentiary hearing, the district court denied the suppression motion, finding that petitioner had no reasonable expectation of privacy in the dumpster since "th[e] dumpster was accessible to the public, as much as if it were sitting in any other open lot." *Id.* at 4a-5a.

3. At petitioner's trial, the government proposed, and the district court gave, the following instruction concerning the attempted tax evasion counts (Pet. App. 52a; Gov't C.A. Br. 27):

> A good faith misunderstanding of the law may negate willfulness. In order for a good faith misunderstanding of the law to negate willfulness, the misunderstanding must be objectively reasonable. Mere disagreement with the law does not constitute such a misunderstanding nor a defense in this case because it is the obliga-

tion of all persons to obey the law whether or not they agree with it.

4. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-15a. It first rejected petitioner's Fourth Amendment challenge to the use of evidence taken from the dumpster. Relying on *California* v. *Greenwood*, 486 U.S. 35 (1988), the court of appeals had "no doubt that the contents of [petitioner's] dumpster, in which financial records were mixed with worn-out teeth and discarded needles, were not within that zone of privacy to which the Fourth Amendment applies." Pet. App. 2a-3a. The court was equally unpersuaded by petitioner's argument that he had a legitimate expectation of privacy in the dumpster because it was within the curtilage of his office, concluding that the district court's finding that the dumpster was accessible to the public was not clearly erroneous. *Id.* at 5a. Quoting *Katz* v. *United States*, 389 U.S. 347, 351 (1967), the court noted that the Fourth Amendment does not protect that which a person knowingly exposes to the public, even in his home or office. Pet. App. 5a.

The court of appeals likewise found no merit to petitioner's argument that the attempted tax evasion charges improperly alleged both attempted evasion of the assessment of a tax and attempted evasion of the payment of a tax. The court observed that neither the text nor the legislative history of Section 7201 requires an indictment to treat that provision as if it were two sections of the United States Code, one applicable to evasion of assessment and one applicable to evasion of payment. Moreover, the court held that the indictment clearly advised both petitioner and the jury of the nature and basis of the charge by

specifically listing the ways in which he evaded taxes. Pet. App. 6a-9a.

Finally, the court rejected petitioner's challenge to the jury instructions, citing its prior decision in *United States* v. *Cheek*, 882 F.2d 1263 (7th Cir. 1989), cert. granted, 110 S. Ct. 1108 (1990), for the proposition that "a mistaken view of the law does not negate willfulness [i]f the defendant's legal belief is objectively unreasonable." Pet. App. 14a.[1]

ARGUMENT

1. Petitioner first contends (Pet. 19-28) that the court of appeals erred in holding that a good faith misunderstanding of the law must be objectively reasonable in order to constitute a defense in a prosecution for a willful violation of the tax laws. That same issue is presented in *Cheek* v. *United States*, cert. granted, 110 S. Ct. 1108 (1990) (to be argued Oct. 3, 1990). We therefore suggest that the Court hold the petition in the instant case and dispose of it as appropriate in light of the decision in *Cheek*.

2. Petitioner next contends (Pet. 28-29) that the "ostrich" or "conscious avoidance" instruction given by the district court on the attempted tax evasion counts departs from the standard of "willfulness" under 26 U.S.C. 7201. The instruction, however, is fully consistent with prior holdings of this Court and decisions of all courts of appeals that have addressed the validity of such an instruction.

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[1] On May 25, 1990, Justice Stevens granted petitioner's application for a stay of the mandate of the court of appeals pending the disposition of his petition for a writ of certiorari, in light of petitioner's assertion that his petition would raise the same issue on which certiorari has been granted in *Cheek*. Pet. App. 53a-54a.

The specific instruction to which petitioner objects reads:

> You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly, as I have used that word.

Pet. App. 51a-52a. Petitioner asserts that this instruction incorrectly informed the jury that willfulness may be inferred from a combination of suspicion and indifference to the truth. The language of the instruction, however, clearly allows the jury to infer only knowledge, not willfulness.

When read in context, it is apparent that the instruction at issue did not, as petitioner argues (Pet. 29), lower the standard of willfulness articulated in *United States* v. *Bishop*, 412 U.S. 346 (1973), and *United States* v. *Pomponio*, 429 U.S. 10 (1976), to one of "careless disregard or reckless indifference to the truth" or negligence.[2] The challenged instruction was given immediately after, and with reference to, the following instructions concerning the willfulness element of 26 U.S.C. 7201:

> With respect to the charges of tax evasion contained in Count 1, 1981, and Count 4, 1983, the term willfully means voluntarily and intention-

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[2] In addition, in *United States* v. *Murdock*, 290 U.S. 389, 394-395 (1933), upon which petitioner extensively relies (Pet. 20-23, 29), the Court stated that the term "willfully" is employed in criminal statutes to characterize "conduct marked by careless disregard whether or not one has the right so to act."

> ally, with the specific intent to evade or defeat a tax which was the legal duty of the Defendant to pay to the Government and which the Defendant knew it was his legal duty to pay.
>
> The word knowingly means that the Defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake, or accident. Knowledge may be proved by the Defendant's conduct and by all the facts and circumstances surrounding the case.

Pet. App. 50a-51a. The instruction at issue here simply explained the significance of circumstantial evidence from which the jury might infer that petitioner knew he had a legal duty to pay taxes. The instruction did not relieve the government of its burden of proving willfulness as defined by the court. The jury still was required to acquit petitioner if it did not find that he acted, in the words of the willfulness instruction just quoted, "voluntarily and intentionally, with the specific intent to evade or defeat a tax which it was the legal duty of the Defendant to pay to the Government, and which the Defendant knew it was his legal duty to pay."

Conscious avoidance instructions have been approved by every circuit that has considered them. See, *e.g.*, *United States* v. *Diaz*, 864 F.2d 544, 550 (7th Cir. 1988), cert. denied, 490 U.S. 1070 (1989); *United States* v. *MacKenzie*, 777 F.2d 811, 818-819 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986); *United States* v. *Massa*, 740 F.2d 629, 643 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985); *United States* v. *Knight*, 705 F.2d 432, 434 (11th Cir. 1983); *United States* v. *Glick*, 710 F.2d 639, 642 (10th Cir. 1983), cert. denied, 465 U.S. 1005 (1984);

United States v. *Cincotta*, 689 F.2d 238, 243-244 (1st Cir.), cert. denied, 459 U.S. 991 (1982); *United States* v. *Restrepo-Granda*, 575 F.2d 524, 528-529 (5th Cir.), cert. denied, 439 U.S. 935 (1978); *United States* v. *Jewell*, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976). Cf. *Turner* v. *United States*, 396 U.S. 398, 416 & n.29 (1970). Thus, review of the conscious avoidance instruction is not warranted.

3. a. Petitioner contends (Pet. 29-35) that the tax evasion charges in the indictment were duplicitous. The court of appeals correctly rejected that claim, Pet. App. 6a-9a, and its ruling does not conflict with any decision of this Court or any other court of appeals.

Counts 1 and 4 charged petitioner with attempted tax evasion for 1981 and 1983, in violation of 26 U.S.C. 7201. Section 7201 provides (emphasis added):

> Any person who willfully *attempts in any manner to evade or defeat any tax imposed by this title* or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 * * *, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

The pertinent language of the tax evasion counts in this case directly tracked the emphasized portion of the statutory text by charging that petitioner "did willfully and knowingly attempt to evade and defeat the substantial income tax due and owing to the United States of America." Each count then identified specific steps petitioner took to evade the tax. See Pet. 4-5.

On appeal, petitioner argued that the indictment was fatally duplicitous[3] because it could be read to charge him with both attempted evasion of assessment and attempted evasion of payment; in his view, 26 U.S.C. 7201 requires those means of evasion to be treated as wholly distinct crimes and to be charged in separate counts. The court of appeals rejected petitioner's claim. Pet. App. 6a-9a. In doing so, the court expressly did not decide whether 26 U.S.C. 7201 creates multiple offenses in the sense that it would *permit* the government, in an appropriate case, to charge a person who evades his taxes for a single year both by creative bookkeeping (to evade assessment) and by concealing assets (to evade payment) with separate offenses and subject him to cumulative punishments. Pet. App. 8a. That issue was not presented because the government did not charge petitioner with separate offenses. Compare *Lawn* v. *United States*, 355 U.S. 339, 341-342 n.1, 343 nn.4 & 5 (1958), and *Cohen* v. *United States*, 297 F.2d 760 (9th Cir. 1962), cited by petitioner (Pet. 31-32, 34, 37). The court of appeals held only that the government may charge a violation of 26 U.S.C. 7201 as a single offense, observing that "nothing in the text or history of Section 7201 requires an indictment to treat Section 7201 as if it were two sections of the United States Code." Pet. App. 8a.

Contrary to petitioners' assertion (Pet. 31-33), the court of appeals' rejection of his duplicity claim does not conflict with *Lawn* v. *United States*, *supra*, or

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[3] " 'Duplicity' is the joining in a single count of two or more distinct and separate offenses." 1 C. Wright, *Federal Practice & Procedure* § 142, at 469 (2d ed. 1982). Fed. R. Crim. P. 8(a) requires that "each offense" be charged in a "separate count" of the indictment.

Sansone v. *United States*, 380 U.S. 343 (1964). In neither case did the Court hold that a single count alleging both evasion of assessment and evasion of payment would be duplicitous; that issue was not before the Court. *Lawn* merely recited, in footnotes, the means of attempted evasion found by the court of appeals in that case. 355 U.S. at 343 nn.4 & 5. *Sansone* noted, citing *Lawn*, that Section 7201 "includes" the offense of willfully attempting to evade or defeat the assessment of a tax as well as the offense of willfully attempting to evade or defeat the payment of a tax. 380 U.S. at 354. The defendant in *Sansone* had argued that although he willfully and fraudulently understated his tax liability for the year involved, he intended to pay his tax in the future and therefore could not be convicted of attempted tax evasion. *Ibid.* Noting that "[t]he indictment * * * charged an attempt to evade income taxes by defeating the assessment," the Court held that even if the defendant intended to pay the tax, that fact would not provide a defense to his attempted evasion of the assessment of the tax. *Ibid.* In other words, as the court of appeals held in the instant case, one can evade taxes by different methods. Thus, in *Sansone*, the fact that the defendant did not violate the statute by one means (evasion of payment) did not preclude the possibility that he violated it by another (evasion of assessment). That holding does not suggest that a defendant may not be charged in a single count with violating the statute by *both* means. *Crain* v. *United States*, 162 U.S. 625, 636 (1896).

Moreover, this Court and the courts of appeals have held that unlawful acts that in some circumstances might be treated as separate offenses may be the subject of a single count charging a single viola-

tion if those acts are part of one overall scheme or course of conduct. See *United States* v. *Johnson*, 319 U.S. 503, 513-515 (1947) (tax evasion); *United States* v. *White*, 879 F.2d 1509, 1512 (7th Cir. 1989), cert. denied, 110 S. Ct. 1471 (1990); *United States* v. *Bryan*, 868 F.2d 1032, 1037-1038 (9th Cir.), cert. denied, 110 S. Ct. 167 (1989); *United States* v. *Shorter*, 809 F.2d 54, 56-57 (D.C. Cir.), cert. denied, 484 U.S. 817 (1987); *United States* v. *Hawkes*, 753 F.2d 355, 357-358 (4th Cir. 1985). Similarly in this case, the specific acts underlying the charges of tax evasion in Counts 1 and 4 were part of one overall course of conduct in each count. See Pet. 4-5; pages 14-15, *infra*.

Even if Section 7201 did define two distinct offenses that may never be charged in the same count, petitioner would not be entitled to reversal of his convictions on the evasion counts in this case. As noted above, the language of Counts 1 and 4 tracked the language of the first portion of Section 7201 proscribing attempted evasion or defeat of a tax—the portion described in *Sansone* as prohibiting evasion of assessment. 380 U.S. at 354. Those counts did not charge an attempt to evade or defeat the payment of a tax, which is referred to in the next portion of Section 7201. Thus, the relevant counts charged only one of the two offenses that petitioner perceives in Section 7201, and those counts therefore were not duplicitous.[4]

Finally, even where, unlike here, an indictment is duplicitous, that pleading defect is not fatal and does not require dismissal of the count. 1 C. Wright, *Fed-*

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[4] As the court below observed, those counts also fully informed petitioner of the nature and basis of the charge. Pet. App. 8a-9a.

eral Practice and Procedure § 142, at 475 (2d ed. 1982). The appropriate remedy is to require the government to elect upon which charge contained in the count it will rely. *Id.* § 145, at 523; see *United States* v. *Robinson*, 651 F.2d 1188, 1194-1195 (6th Cir.), cert. denied, 454 U.S. 875 (1981).[5] Because, as just explained, the relevant counts in this case were not duplicitous even under petitioner's view of 26 U.S.C. 7201, there was no need for the government to make such an election. It nevertheless is noteworthy that consistent with the theory of the indictment (which charged attempted evasion and defeat of the tax, not of payment), the jury instructions did not give the jury the option of convicting petitioner of attempted evasion of payment.[6] The district court's description of Section 7201 referred only to an attempt "in any manner to evade or defeat any tax imposed by this title," without any reference to evasion of payment, Pet. App. 49a; the

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[5] This remedy is sufficient to serve the purposes of the non-duplicity rule, as explained in C. Wright, *supra*, § 142, at 475:

> The vice of duplicity is that there is no way in which the jury can convict of one offense and acquit on another offense contained in the same count. A general verdict of guilty will not reveal whether the jury found the defendant guilty of one crime and not guilty of the others, or guilty of all. It is conceivable that this could prejudice [the] defendant in sentencing, in obtaining appellate review, and in protecting himself against double jeopardy.

Accord, *United States* v. *Duncan*, 850 F.2d 1104, 1108-1109 n.4 (6th Cir. 1988), cert. denied, 110 S. Ct. 732 (1990); *United States* v. *Shorter*, 809 F.2d at 58.

[6] In fact, references to evasion of payment were specifically deleted from the proposed instructions at petitioner's insistence, based on the very duplicity arguments he now advances in this Court. See Pet. App. 21a-35a.

court's recitation of the elements of the offense made no reference to evasion of payment, *ibid.*; and the court defined an affirmative act as "an act, the likely effect of which would be to mislead or conceal," *id.* at 50a, a description that pertains to evasion of assessment.

In addition to the Seventh Circuit in the instant case, both the First and the Fifth Circuits have examined the issue recently and determined that an indictment such as that under which petitioner was charged is not fatally duplicitous. See *United States* v. *Waldeck*, No. 89-2152 (1st Cir. July 12, 1990), slip op. 5-10 [7]; *United States* v. *Masat*, 896 F.2d 88, 91 (5th Cir. 1990). At the same time, there is no conflict with other appellate decisions that might justify review on this issue. Although the cases on which petitioner relies (Pet. 33-34) describe Section 7201 as including two different offenses, they do not suggest that a count that alleges both attempted evasion of assessment and attempted evasion of payment of the same tax is duplicitous.[8] *A fortiori*, they do not suggest that counts (such as those at issue here) that do not allege evasion of both the tax and its payment are duplicitous.

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[7] In *Waldeck*, the court did not have to decide whether Section 7201 defines two crimes, because it concluded that the indictment charged only evasion of assessment. Slip op. 9.

[8] The Seventh Circuit did not so hold in *United States* v. *England*, 347 F.2d 425 (1965), or *United States* v. *Dack*, 747 F.2d 1172 (1984), cited by petitioner in support of his claim of an intra-circuit conflict (Pet. 34). In any event, this Court ordinarily does not grant review to resolve an asserted intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

b. Proceeding on his assumption that Section 7201 creates two distinct crimes, petitioner challenges (Pet. 35-39) the determination by the court of appeals that the indictment adequately informed petitioner of "what he had to prepare to defend against" and that the jury understood what it was being asked to decide. Pet. App. 8a-9a. He appears to assert that there must be a definitive identification of evidence to show whether it supports either evasion of assessment or evasion of payment. Petitioner's argument rests on the erroneous premise that evasion of assessment and evasion of payment cannot be proved by the same affirmative acts. Although *Spies* v. *United States*, 317 U.S. 492 (1943), construed Section 7201 to require proof of an affirmative act of evasion, it did not require that the affirmative act be identified as one exclusively supporting either attempted evasion of assessment or attempted evasion of payment. Nor do any of the cases cited by petitioner suggest such a requirement. Indeed, both the First and Fifth Circuits have recently held that the same conduct can constitute both an attempt to evade payment and an attempt to evade assessment. *United States* v. *Waldeck*, slip op. 15 (filing false W-4 forms "may be used as evidence of either evasion of assessment of tax or evasion of payment of tax or both"); *United States* v. *Masat*, 896 F.2d at 91 (assigning income and property to nominees and filing false W-4 forms "are acts constituting both evasion of payment and evasion of assessment").

Some of the affirmative acts alleged in this case constituted attempts to evade both assessment and payment. Those acts were: (1) "using checks made payable to petitioner and which constituted income, endorsing the checks and giving the checks to others

in payment for expenses, in order to conceal his income"; (2) "requesting and receiving rent payments in the form of silver dollars instead of Federal Reserve Notes, the silver dollars have [sic] a face value of $20 and having a market value of approximately $297"; and (3) "depositing and cashing checks at out-of-town banks." Pet. C.A. Br. App. B-2, B-6. All of those acts were designed to conceal income and thereby prevent an accurate determination of petitioner's tax liability. Such an evasion of assessment is, in turn, a means of ultimately evading the payment of the concealed tax liability. Thus, petitioner was not entitled to have acts identified as relating to one or the other of the two methods of evasion set forth in Section 7201.[9] Further review therefore is unwarranted.

4. Petitioner concedes (Pet. 39) that the fourth issue he raises is one "never addressed in any reported tax case: whether the government can sustain a conviction for attempted income tax evasion where the government has not calculated the tax due

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[9] *Bollenbach* v. *United States*, 326 U.S. 607 (1946), on which petitioner relies (Pet. 38-39), does not suggest a contrary conclusion. There, the defendant was convicted of conspiracy to commit an offense in violation of the National Stolen Property Act. The court of appeals affirmed the conviction, even though it found that the district court had given an erroneous instruction on the conspiracy charge, reasoning that the defendant could have been convicted as an accessory after the fact. This Court reversed, holding that the defendant had not been indicted or charged on the accessory theory and that, indeed, the statute criminalizing such conduct was not enacted until after the period covered by the indictment. By contrast, in this case petitioner was properly convicted of the crime with which he was charged: attempted evasion of tax.

and owing resulting from the affirmative act or acts constituting [*sic*] the attempt." See Pet. 39-43. Petitioner's novel theory is that because a willful failure to file a tax return or failure to pay taxes is not alone sufficient to constitute an attempt to evade tax, "any tax evaded or avoided as a result of said failures would not be a tax which [petitioner] 'attempted to evade.'" [10] Pet. 40-41. There is no merit to petitioner's position.

Although no court has squarely addressed the issue petitioner raises, *Spies* v. *United States* reveals the fatal flaw in petitioner's reasoning. There, the Court held that attempted evasion may consist of a combination of willful omissions and willful commissions (affirmative acts). The Court stated: "Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony." 317 U.S. at 499. The Court also stated, with respect to the defendant's acts in that case: "If on proper submission the jury found these acts, taken together with willful failure to file a return and willful failure to pay the tax, to constitute a willful attempt to evade or defeat the tax, we would consider conviction of a felony sustainable." 317 U.S. at 500. Thus, in an evasion case involving willful omissions along with affirmative acts, the omissions are part of the attempt to evade the tax.

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[10] Petitioner does not deny that he evaded at least some taxes by his affirmative acts. He contends (Pet. 43), however, that he was prejudiced by the government's method of calculation because the amount of tax he attempted to evade was higher than it otherwise would have been, and he therefore appeared more culpable to the jury.

Accordingly, the proper calculation of tax deficiency must include the tax due and owing as a result of the omissions as well as the tax due and owing as a result of the affirmative acts. Petitioner's argument to the contrary is baseless and does not warrant review by this Court.

5. Finally, petitioner contends (Pet. 44-50) that his Fourth Amendment rights were violated by the informant's retrieval of certain documents from the dumpster located in his office parking lot. The court of appeals thoroughly reviewed the factual findings made by the district court in support of its conclusion that petitioner had no legitimate expectation of privacy in the dumpster and did not find those findings to be clearly erroneous. Further review of this fact-bound claim is not warranted.

Petitioner asserts (Pet. 45) that "there is no reasonable basis to believe that the dumpster was generally open to the public," but the legal and factual premises for that assertion (Pet. 45-46) are incorrect. First, he argues that the dumpster was within the business curtilage and was not for public "consumption" or use. The district court, however, found that the dumpster was shared by other tenants, that it was not in an enclosed lot, and that it was accessible to the public. Gov't C.A. Br. 32. The court of appeals noted further support in the record for the finding of accessibility: the dumpster was located more than 55 feet from the nearest part of the office building; patients, employees, other building visitors and even strangers used the open 32-space parking lot; and anyone in the lot could walk up to the unlocked dumpster. Pet. App. 4a-6a.

Second, petitioner relies on the evidence that "no trespassing" signs were posted. As this Court has

noted, however, "it does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment. * * * [T]he law of trespass confers protections from intrusion by others far broader than those required by Fourth Amendment interests." *Oliver* v. *United States*, 466 U.S. 170, 183-184 n.15 (1984) (no legitimate expectation of privacy in open field despite the fact that intrusion constituted trespass at common law).

Third, petitioner points to the fact that the dumpster was placed on the property for the disposal of medical waste and toxic matter and that the property was partially fenced. Both courts below pointed out, however, that all tenants shared the dumpster. Presumably, the non-medical tenants deposited trash other than medical waste and toxic materials. Indeed, the documents petitioner sought to suppress were neither toxic nor medical waste. The district court, affirmed by the court of appeals, specifically noted the partial fencing but determined, in light of the other factors, that the dumpster was accessible to the public. Gov't C.A. Br. 14.

Petitioner has failed to demonstrate that any of the factual findings underlying the Fourth Amendment ruling by the courts below are unsupported by the record. This Court ordinarily has declined to disturb findings of fact in which two courts below have concurred. *United States* v. *Doe*, 465 U.S. 605, 614 (1984). Because the record in this case provides overwhelming support for the findings below, there is no reason for the Court to depart from that practice here. On these facts, the court of appeals correctly found that under *California* v. *Greenwood*, 486 U.S. 35 (1988), the abandoned contents of petition-

er's dumpster were not within the zone of privacy to which the Fourth Amendment applies. See *Katz* v. *United States*, 389 U.S. 347, 351 (1967); *United States* v. *Michaels*, 726 F.2d 1307 (8th Cir.), cert. denied, 469 U.S. 820 (1984).[11]

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[11] Petitioner's effort to distinguish *Michaels* is unsuccessful. The two cases cited by petitioner (Pet. 47) both predate (but foreshadow) *Greenwood*. While holding that trash deposited in opaque taped containers had been abandoned, the Second Circuit suggested in *United States* v. *Terry*, 702 F.2d 299, cert. denied, 461 U.S. 931 (1983), that it would be possible to preclude inspection by shredding or burning documents before discarding them. Although the court also suggested that written restrictions on containers or their retention on private property might indicate an intent to retain a privacy interest in the contents, that was nothing more than a parenthetical example of circumstances that were not presented to the court and, therefore, pure dictum.

Petitioner's reliance on *United States* v. *Vahalik*, 606 F.2d 99 (5th Cir. 1979), cert. denied, 444 U.S. 1081 (1980), is similarly misplaced. In that case, the defendant relied on an ordinance preventing unauthorized interference with garbage receptacles as evidence of his legitimate expectation of privacy in his trash. The Fifth Circuit rejected his argument because there was "no indication in the record that appellant relied upon the ordinance to increase his expectation of privacy, or that he was even aware of the ordinance." 606 F.2d at 101. Petitioner also argues that a local ordinance prohibiting unauthorized interference with garbage receptacles gave him a legitimate expectation of privacy in his trash but, like the defendant in *Vahalik*, he does not point to any evidence in the record that he relied on that ordinance.

CONCLUSION

The petition for a writ of certiorari should be held with respect to the first question presented and then be disposed of as appropriate in light of this Court's disposition of *Cheek* v. *United States*, cert. granted, 110 S. Ct. 1108 (1990) (to be argued Oct. 3, 1990). In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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